80-1656

No. _____

Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1980

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,

Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, STEVEN SHOLLY AND DONALD E. HOSSLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARK AUGENBLICK
Attorney of Record

GEORGE F. TROWBRIDGE
JAY E. SILBERG
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Counsel for Petititoners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the court of appeals erred in ruling that the Nuclear Regulatory Commission must hold a prior hearing on a proposed amendment to a nuclear power plant license whenever an interested party requests one, notwithstanding a correct finding by the Commission that the amendment presents "no significant hazards consideration"?

Supreme Court Rule 28.1 Statement:

General Public Utilities Corporation	Parent
Metropolitan Edison Company	Subsidiary
Jersey Central Power & Light Company	Subsidiary
Pennsylvania Electric Company	Subsidiary
GPU Service Corporation	Subsidiary

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	17
APPENDIX A: Order Of The Court Of Appeals Denying Suggestion For Rehearing *En Banc*	1a
APPENDIX B: Order Of The Court Of Appeals Denying Rehearing	19a
APPENDIX C: Opinion Of The Court Of Appeals And Judgment	21a
APPENDIX D: NRC Order For Temporary Modification Of License Dated June 12, 1980	45a
APPENDIX E: NRC Memorandum And Order Dated June 12, 1980	51a
APPENDIX F: Exhibit A To Petition For Rehearing And Suggestion For Rehearing *En Banc*	61a

TABLE OF AUTHORITIES

CASES: PAGE

Brooks v. *Atomic Energy Commission*, 476 F.2d 924 (D.C. Cir. 1973) 11

E.E.O.C. v. *Associated Dry Goods Corp.*, _____ U.S. _____, 101 S.Ct. 817 (1981)..... 13

General Electric Company (Vallecitos Boiling Water Reactor), 1 AEC 541 (1960) 8

Maggio v. *Zeitz*, 333 U.S. 56 (1948) 11

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950)..... 12

North Alabama Express, Inc. v. *United States*, 585 F.2d 783 (5th Cir. 1978) 12

Northern Indiana Public Service Co. v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12 (1975) 13

Power Reactor Development Co. v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396 (1961) 13

Schroeder v. *City of New York*, 371 U.S. 208 (1962).... 12

Sholly v. *Nuclear Regulatory Commission*, _____ F.2d _____ (D.C. Cir. 1980)..... 2

Union of Concerned Scientists v. *Atomic Energy Commission*, 499 F.2d 1069 (D.C. Cir. 1974)..... 11

Vermont Yankee Nuclear Power Corporation v. *National Resources Defense Council*, 435 U.S. 519 (1978)... 7, 16

Walker v. *City of Hutchinson*, 352 U.S. 112 (1956) 12

STATUTES AND RULES:

5 U.S.C. §554(b) 12

28 U.S.C. §1254(1) 2

28 U.S.C. §1651(a) 15

28 U.S.C. §2349(b) 15

Table of Authorities Continued

STATUTES AND RULES:	PAGE
42 U.S.C. §2039	4
42 U.S.C. §2231	12
42 U.S.C. §2239(a)	2
Administrative Procedure Act, 5 U.S.C. §551 et seq.	6
Pub. L. 85-256, 71 Stat. 576 (1957)	8
Pub. L. 87-615, 76 Stat. 409 (1962)	7
Pub. L. 93-438, 88 Stat. 1233 (1974)	9
AEC Regulation 50.59 (1961)	9, 10
MISCELLANEOUS:	
Staff of the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., Improving the AEC Regulatory Process, Joint Comm. Print (1961)	9, 10
AEC Regulatory Problems: Hearing Before the Subcommittee on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. (1962)	8, 10
S. Rep. No. 1677, 87th Cong., 2d Sess., *reprinted in* [1962] *U.S. Code Cong. & Ad. News* 2207	10, 13
27 Federal Register 5491 (1962)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,

Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, STEVEN SHOLLY AND DONALD E. HOSSLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.[1]

---

[1] In the court below, party-respondents who are not named in the above caption include the following: The United States of America, United States Nuclear Regulatory Commission, John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie and Peter A. Bradford.

OPINIONS BELOW

The orders of the court of appeals denying the petition for rehearing and the suggestion for rehearing *en banc*, with a dissenting statement filed by four Judges, (App. A and B, pp. 1a-19a, *infra*) have not been reported. The panel decision of the court of appeals (App. C, pp. 21a-44a) also has not been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1980. The appellate court's orders denying rehearing and rehearing *en banc* (App. A, p. 2a; App. B, p. 19a), were entered on March 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act (the "Act"), as amended, 42 U.S.C. §2239(a), provides in relevant part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit *** the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application *** for a construction permit for a facility *** [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue *** an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any ap-

plication for *** an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT OF THE CASE

On March 28, 1979, a serious nuclear accident occurred at Three Mile Island Nuclear Station, Unit 2 ("TMI-2"), resulting in the accumulation of radioactive krypton gas in the reactor containment building. Removal of the gas was necessary before further decontamination and cleanup of the facility could be undertaken.

In the year following the accident, the Nuclear Regulatory Commission ("the Commission") prepared and issued first a Draft and then a Final Environmental Assessment on decontamination of the TMI-2 reactor containment building atmosphere. These documents evaluated various alternatives to accomplish decontamination in light of over eight hundred written comments received from individuals and organizations, statements made at public hearings, meetings held with representatives of citizen groups in the area around TMI-2, and the advice of Federal, State and local government agencies and scientists having expertise with regard to the subject of decontamination and related matters. The Final Environmental Assessment concluded that decontamination of the reactor building atmosphere was essential, that all the alternative means for accomplishing decontamination would have a negligible impact on the public health, and that a controlled release of the containment atmosphere to the outside environment ("purging") was the most desirable alternative and therefore the recommended course of action.

The Commission reviewed the Final Environmental Assessment at two public meetings and at one meeting with the Advisory Committee on Reactor Safeguards ("ACRS"), a prestigious independent panel charged with reviewing Commission licensing actions for their potential safety implications. *See*, 42 U.S.C. §2039. These deliberations resulted in unanimous agreement that purging the reactor containment building atmosphere was the best way to eliminate the krypton gas, and that the physical health and environmental impacts from purging would be negligible.

The Commission then issued two Orders on June 12, 1980. One, entitled "Order For Temporary Modification of License", made a temporary modification to the TMI-2 license to permit purging to occur at a faster rate than the plant's Technical Specifications then allowed, but without increasing the radioactive dose to any member of the public. Appendix D, pp. 45a-49a. The other Order, entitled "Memorandum and Order", authorized purging to be conducted starting 10 days from the date of the Order. Appendix E, pp. 51a-60a.

The Order for Temporary Modification of License was made effective immediately. That Order included a finding that the license amendment it authorized presented no significant hazards consideration within the meaning of Section 189(a) of the Act. Appendix D at p. 47a. The Order also provided that a hearing could be sought within 30 days by any party whose interest might be affected, but a request for a hearing would not stay the effectiveness of the Order. *Id.* at p. 48a.

Respondents filed a petition for review of the two Orders with the United States Court of Appeals for the District of Columbia Circuit. Their petition sought to suspend the effectiveness of the Orders and further

sought a declaratory judgment that amendments to the TMI-2 operating license required notice and a *prior* hearing. The court of appeals denied respondents' request for temporary relief, which precipitated a flurry of motions and petitions filed with the Courts of Appeals for both the District of Columbia Circuit and the Third Circuit, in which respondents sought to enjoin the scheduled purging of the TMI-2 reactor containment building. All motions for injunctive relief were denied, and the actions in the two Circuits were consolidated in the District of Columbia Circuit.

Purging at TMI-2 began on June 28 and was completed on July 11, 1980. It resulted in off-site radioactive doses even lower than anticipated and well within all permissible dose limits set forth in applicable Commission regulations, the restrictions set in the TMI-2 operating license, and the requirements of the June 12 Order.

The consolidated review petitions went forward on respondents' request for a declaratory judgment that the Commission had deprived them of their statutory right to notice and a prior hearing on the TMI-2 license amendment and the Order authorizing purging. On November 19, 1980, a panel of the Court of Appeals for the District of Columbia Circuit held, in a *per curiam* decision, that under Section 189(a) of the Act the Commission "is required to hold a hearing on license amendments whenever interested parties request one." Appendix C, p. 44a. The court was of the view that respondents had requested a hearing.[2] Therefore, under the court's construction of the statute, the Commission

[2] The court of appeals held that "petitioners' continued interest in — and opposition to — the actions of the NRC at TMI-2 clearly constituted a request for a hearing." App. C at p. 39a, n.25.

was required to hold a hearing *prior* to making the Orders effective.

Petitions for rehearing by petitioners and the Commission, and petitioners' suggestion for rehearing *en banc*, were denied by the court of appeals on March 4, 1981. Appendix A and B at pp. 1a-19a. Four Judges dissented from the denial of the suggestion for rehearing *en banc* and filed a 15 page "Statement On Denial of Rehearing *En Banc*." Appendix A at pp. 3a-17a.

REASONS FOR GRANTING THE WRIT

The court of appeals below decided an important question of federal law, namely whether the Commission is required under Section 189(a) of the Act to hold a prior hearing on a proposed amendment to a nuclear power plant operating license upon request, notwithstanding that the amendment has no health or safety significance. The court of appeals' decision requires the attention of this Court, since it construes a federal statute in a manner that is directly contrary to the intent of Congress, that conflicts with a prior judicial construction of the same provision, that results in an anomalous procedure which offends both the Administrative Procedure Act ("APA"), 5 U.S.C. §551 *et seq.*, and fundamental notions of due process, and that flies in the face of the interpretation consistently given to the statute by the agency charged with administering it.

If allowed to stand, the decision below will throw the Commission's regulatory process back to the paralyzed state that prompted Congress to amend the Act in 1962 to add the very "no significant hazards consideration" language which the Commission invoked here. The practical result of the decision will be to force the closing of nuclear power plants throughout the nation, without

compensating benefits to the health and safety of the public. Review by this Court is therefore imperative.

1. Section 189(a) of the Act does not require a mandatory prior hearing on every amendment to a nuclear power plant license simply because one is requested. Section 189(a) provides that licensing actions for nuclear power reactors fall into three categories:

> (1) construction permits, which require a mandatory hearing after thirty days notice and publication in the *Federal Register* (second sentence);
>
> (2) operating licenses or amendments to construction permits or operating licenses involving significant safety issues, which do not require a prior hearing if none is requested after thirty days notice and publication, but do require a hearing if one is requested by an interested party (first and third sentence); and
>
> (3) amendments to construction permits or operating licenses with respect to which the Commission has made a determination that the amendment "involves no significant hazards consideration," which require neither notice nor a prior hearing (fourth sentence).[3]

This construction follows from a fair reading of Section 189(a) and is inescapable when the statute is read in light of its legislative history, particularly the purpose sought to be served by the amendments which added the "no significant hazards consideration" language at issue here.

Section 189(a) reached its present form in the 1962 amendments to the Act, Pub. L. 87-615, 76 Stat. 409

---

[3] The complex process established by the Act and Commission regulations for the licensing of commercial nuclear power reactors is described in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 525-527 (1978).

(1962). As first enacted in 1954, Section 189(a) contained only the first sentence of what is now the text of the statute. In 1957, the Act was amended to add essentially the second sentence, which established a mandatory public hearing at the construction permit stage of licensing a nuclear power reactor. Pub. L. 85-256, 71 Stat. 576 (1957).

The Commission initially interpreted the 1957 amendments to require it to give notice and to hold a hearing *every time* an operating license or a construction permit was granted or *amended*.[4] The Commission's interpretation resulted in an inordinate number of unnecessary hearings,[5] a situation which both Congress and the Commission rapidly came to regard as unacceptable.

The Commission began to grapple with the problem in the *Vallecitos* proceeding, *General Electric Company* (Vallecitos Boiling Water Reactor), 1 AEC 541 (1960). There, the Commission authorized a simplified procedure whereby a license amendment found by the Commission staff to present "no significant new hazards considerations" could be approved directly by the staff without prior notice or opportunity for a hearing. Copies of the "no significant new hazards consideration" finding and the amendment authorization were filed in the public record of the proceeding so that interested parties could file exceptions or seek judicial review.

---

[4] *See, e.g.*, AEC Regulatory Problems: Hearing Before a Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 87th Cong., 2d Sess. (1962) ("AEC Regulatory Hearing"), at 6 (Testimony of Commissioner Olson).

[5] As Commissioner Olson illustrated "the technical specifications often covered even the color of outbuildings, and in order to change them we had to go through the same process [of hearings.]" AEC Regulatory Hearing at 7.

This change was favorably received by the Staff of the Joint Committee on Atomic Energy in its 1961 study on how to improve the Atomic Energy Commission ("AEC") regulatory process.[6] The Joint Committee Staff there criticized the Commission for holding hearings on all licensing actions, endorsed the *Vallecitos* approach, and noted that "[t]he handling of changes would be facilitated if the Commission's recent order in the *Vallecitos* case, could be broadened by statute or regulation to a general rule."[7]

The Commission acted on this suggestion and promulgated AEC Regulation 50.59, which codified the procedure used in *Vallecitos*. 27 Fed. Reg. 5491, 5492-5493 (1962). Under AEC Regulation 50.59, if the Commission staff found that a proposed amendment to a facility's license did not present "significant hazards considerations," the staff could authorize the amendment *without notice or a prior hearing*. On the other hand, if the staff found that the proposed change presented significant hazards considerations, the change had to be referred to the ACRS and the Commission had to order a public hearing in accordance with applicable procedures.

It was against this backdrop of the problems caused by the Commission's post-1957 practice, and the subsequent administrative efforts to mitigate them in *Vallecitos* and AEC Regulation 50.59, that the Joint Committee on Atomic Energy proposed the 1962 amendments to Section 189(a) of the Act. In hearings on the

---

[6] The Atomic Energy Commission is the forerunner of what is now the Nuclear Regulatory Commission. Pub. L. 93-438, 88 Stat. 1233 (1974).

[7] Staff of the Joint Committee on Atomic Energy 87th Cong., 1st Sess., Improving the AEC Regulatory Process, Joint Comm. Print (1961), Vol. I at 73, n.4.

proposed legislative changes, considerable attention was focused on the Commission's experience of the past several years, as reflected in submitted studies and reports and in testimony at the Committee hearings.[8] Indeed, the Joint Committee's report on the bill that enacted the 1962 amendments to the Act expressly adopted the *Vallecitos* approach as embodied in AEC Regulation 50.59.[9]

There is thus no question that the 1962 amendments were intended by Congress to ratify the Commission practice as embodied in AEC Regulation 50.59, thereby providing explicit statutory authorization for the Commission to continue dispensing with notice and opportunity for a prior hearing on proposed license amendments which involved no significant safety implications. Despite this unequivocal legislative intent, the court of appeals below reverted to the pre-*Vallecitos* procedures by ordering the Commission to hold a prior hearing whenever one is requested, making it irrelevant whether the Commission finds that the proposed amendment has no safety significance. Thus, the court of appeals effectively read the "no significant hazards consideration" language out of the Act while substituting its judgment for the will of Congress.[10]

---

[8] *See,* Improving the AEC Regulatory Process, Vol. I at 35-37, 49-50, 73; *Id.,* Vol. II at 464, 484-96, 579, 581 and 582. *See also,* AEC Regulatory Hearings at 6-7.

[9] *See,* S. Rep. No. 1677, 87th Cong., 2d Sess. at 7-8, *reprinted in* [1962] *U.S. Code Cong. & Ad. News* 2207, 2214-2215.

[10] The court of appeals ignored the legislative history set forth above and instead cited selectively from portions of the legislative history which do not, in fact, support the proposition that Congress intended a prior hearing to be held on amendments presenting no significant hazards considerations. *See,* Statement on Denial of Rehearing *En Banc,* App. A at p. 10a.

In so concluding, the court of appeals relied primarily on its earlier decision in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924 (1973), described below as holding that a prior hearing on a license amendment may not be denied if requested. *Brooks*, however, dealt only with the Commission's obligation to give notice of a proposed amendment if it does not make a "no significant hazards consideration" determination. The court of appeals declined to follow a subsequent decision from the same circuit, *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (1974), in which a different panel, after reviewing the legislative history of the 1962 amendments to the Act, stated *twice* that a license amendment can be made without opportunity for a hearing if the Commission determines that it involves no significant hazards consideration. 499 F.2d at 1078, text at n.22, and 1084, n.36. The court of appeals' reliance on *Brooks* and disregard of *Union of Concerned Scientists* evidences a clear conflict within the District of Columbia Circuit, which is the circuit most likely to rule on cases arising out of Section 189(a) of the Act. This conflict, underscored by the sharply worded dissent from the denial of rehearing *en banc*, is further reason for this Court to review the decision. *Cf. Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948).

2. The court of appeals' strained reading of Section 189(a) offered below is clearly in error and must be corrected. The decision acknowledges that the fourth sentence of Section 189(a) permits the Commission to dispense with *notice* of a proposed license amendment where the amendment presents "no significant hazards consideration." App. C at p. 34a. However, in precisely the same circumstances, the court of appeals construes

the statute as requiring a prior hearing on request. The obvious paradox was dismissed below as being no more than a paradox "in theory." App. C at p. 35a, n.20. Yet, in the court's own words, "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice." *Id.*

When judicial construction of a federal statute produces such an anomalous result, it is inherently suspect. The effect of the decision below is to read Section 189(a) as affording an interested party the right to demand a prior hearing, while simultaneously denying him the right to receive notice of the proposed action on which he is entitled to be heard. Neither the APA nor fundamental notions of due process countenance such a result.[11] It is inconceivable that Congress, which incorporated the procedural safeguards afforded by the APA into the Act,[12]

[11] Under the APA, it is beyond dispute that, if a party is entitled to a hearing on proposed agency action, he is also entitled to receive adequate notice of that action. *See,* 5 U.S.C. §554(b); *North Alabama Express, Inc.* v. *United States,* 585 F.2d 783, 786 (5th Cir. 1978). Indeed, this notice requirement is fundamental to due process. *Schroeder* v. *City of New York*, 371 U.S. 208, 211-12 (1962). Notice or proposed action and opportunity for a hearing thereon cannot be disassociated. As this Court stated in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the right to a hearing " has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *See also, Walker* v. *City of Hutchinson,* 352 U.S. 112, 115 (1956) ("the right to a hearing is meaningless without notice"). The statutory construction of Section 189(a) offered by the court below impermissibly uncouples these two basic concepts. *See* App. C at p. 35a, n.20.

[12] Section 181 of the Atomic Energy Act, 42 U.S.C. §2231, states that "[t]he provisions of the Administrative Procedure Act shall apply to all agency action taken under this chapter, and the terms 'agency' and 'agency action' shall have the meaning specified in the Administrative Procedure Act." The legislative history of the 1962

ever intended such an anomalous result. Rather, the clear intent was to dispense with both notice and a prior hearing where the proposed license amendment presents no significant hazards to public health and safety.

3. This is the manner in which the Commission has consistently read the statute for almost twenty years.[13] Its interpretation should not be lightly dismissed. *See, e.g., Northern Indiana Public Service Co.* v. *Porter County of the Izaak Walton League, 423 U.S. 12, 14-15 (1975); Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 367 U.S. 396, 408 (1961). This Court very recently again emphasized that an agency's contemporaneous construction of its founding statute "deserves special deference when it has remained consistent over a long period of time [citation omitted]." *E.E.O.C.* v. *Associated Dry Goods Corp.*, _____U.S._____, 101 St. Ct. 817, 823, n.17 (1981).

In giving short shrift to the Commission's interpretation of Section 189(a),[14] the court of appeals never

---

amendments makes it clear that Congress intended the APA procedures to remain applicable to the licensing process established by the amendments. *See* Senate Report No. 1677, 87th Cong., 2d Sess., at pp. 5-6, *reprinted in* [1962] *U.S. Cong. & Admin. News,* at pp. 2212-13.

[13] The Commission has consistently interpreted the 1962 amendments to allow it to make license amendments which present "no significant hazards considerations" effective immediately without notice or opportunity for a prior hearing. Some examples of this interpretation by the Commision are listed in the court of appeals' opinion. *See,* App. C at p. 40a, n.26.

[14] The court of appeals felt that the Commission's interpretation was not worthy of deference because the statute and its legislative history are "unambiguous". App. C at 40a, n.26. Only a few sentences earlier, however, the court of appeals made the point that

inquired into the purposes and policies underlining that interpretation. Had it done so, it would have realized the grave practical consequences of abandoning the procedure that has heretofore been followed by the Commission in reviewing license amendment applications.

It is noteworthy that the amendment process plays an integral and pervasive role in the Commission's regulatory program for all seventy-one licensed nuclear power reactors. Operating license amendments are extremely numerous. For example, at the present time, there are about eight hundred license amendment actions pending.[15]

As part of its review of license amendment applications, the Commission staff determines whether the amendment involves "no significant hazards consideration." Changes falling into that category involve changes which are essentially neutral from a safety standpoint, as well as changes which are believed to improve safety. Boyd Aff. at para. 5. Of the hundreds of license amendment applications pending at any one time, many would be found to present no significant hazards consideration. For example, in the last four calendar years, the Commission has published in the *Federal Register* notice of more than 1500 license amendments which fall into this category. *Id.*

Obviously, any reinterpretation of statutory requirements which might necessitate Commission hearings on such a large scale, would have a dramatic impact on the administrative machinery for regulation of nuclear

---

"[t]he text and legislative history of the section are replete with ambiguities and inconsistencies." App. C at pp. 38a-39a, n.24.

[15] Affidavit of Roger S. Boyd, dated December 3, 1980 ("Boyd Affidavit"), App. F, *infra* at p. 62, para. 4.

plants. The expected delay in processing a "no hazards" amendment application would be at least nine months. Boyd Aff. at para. 9. Moreover, this estimate assumes that the Commission staff has at its disposal sufficient resources to handle the increase in the number of hearings, which is not the case. *Id.* at para. 10. Nor does the possible use of rulemaking in an effort to avoid delays and resource allocation problems offer a viable alternative procedure for dealing with the expanded workload. *Id.*

Such a monumental disruption of the Commission's current license amendment review process would serve no discernable purpose. In fact, it would significantly undermine the public interest. The operating license amendments which are subject to the court of appeals' ruling are those which present no significant danger to public health and safety. At the present time, they ordinarily can be reviewed in a timely manner by the Commission and, where appropriate, receive agency approval without threatening a plant shutdown. This action is, in most instances, not irreversible, and the availability of a subsequent hearing assures further consideration by the Commission of relevant issues raised by interested parties. *See,* Boyd Aff. at para. 8.[16]

The imposition of a prior hearing requirement raises the very real specter of needless plant shutdowns while the cumbersome hearing process runs its course. *Id.* at para. 7. In economic terms alone, the impact on the public would be severe. Replacement power for a typical

[16] Where a party alleges that he is threatened with irreparable injury by a "no hazards" license amendment, he is not without a remedy. The allegedly aggrieved party can seek *pendente lite* relief from the court of appeals, as did petitioners here, pursuant to 28 U.S.C. §§2349(b) and 1651(a).

nuclear plant will cost the licensee and its customers between $250,000 and $500,000 for each day the reactor is down. Boyd Aff. at para. 11. In some areas of the country, particularly the Northeast, replacement power will be generated in large part from more expensive imported oil, used at a rate of about 30,000 barrels per day for a 1000 MWe nuclear plant. *Id.* These consequences are multiplied for every nuclear unit forced off-line as a result of the procedures which the court of appeals' decision would require.

4. The need for review by this Court is therefore compelling. "[T]he panel's interpretation of Section 189(a), taken as a whole, renders it virtually impossible for the NRC faithfully to follow the explicit congressional directives found in that section." Statement On Denial of Rehearing *En Banc,* App. A at p. 13a. In so construing the statute, the United States Court of Appeals for the District of Columbia Circuit has once again "unjustifiably intruded into the administrative process." *Vermont Yankee, supra,* 435 U.S. at 556. It has dictated a radical change in nuclear energy regulation, a change that turns on its head the Congressional framework for licensing nuclear power plants, and effectively, "eviscerate[s] the congressional mandate found in both the third and fourth sentences of section 189(a). . . ." Statement on Denial of Rehearing *En Banc,* App. A at p. 13a. The decision below severly impacts on the Commission's regulatory function to the decided detriment of the utility industry and without discernible benefit to the public. It should not be allowed to stand.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 2, 1981

Respectfully submitted,

MARK AUGENBLICK
Attorney of Record

GEORGE F. TROWBRIDGE
JAY E. SILBERG
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Counsel for Petititoners

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were served by deposit in the United States mail, first class, postage prepaid, upon each of the following:

Hon. Wade Hampton McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Stephen F. Eilperin, Esq.
Solicitor
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Daniel P. Sheehan, Esq.
Robert Hager, Esq.
1324 North Capitol Street
Washington, D.C. 20530

/s/ MARK AUGENBLICK